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Supreme Court, U.S.
FILED

No. 01 481 SEP 19 2001

IN THE

Supreme Court of the United States

BABO BEAZLEY LOE, AND LOE'S HIGHPORT, INC.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether it is objectively unreasonable for an officer to rely on a search warrant authorizing the seizure of broad categories of documents unrelated to, but "logical indicators of" the crimes described in the affidavit in support of the warrant.

II.

Whether, in a prosecution for money laundering brought under 18 U.S.C. § 1957, there must be jury unanimity regarding the specified unlawful activity from which the laundered funds were derived?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Babo Beazley Loe
2. Cornelius Dewitt Loe
3. Loe's Highport, Inc.
4. The United States of America

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v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Babo Beazley Loe, and Loe's Highport, Inc. respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 17, 2001, because the Court of Appeals has decided two important federal questions in ways that conflict with relevant decisions of this Court.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *United States v. Loe, et al*, reported at 248 F.3d 449 (5th Cir.2001). A copy of the opinion is attached to this petition as Appendix A. By order entered on June 21, 2001, the Court of Appeals for the Fifth Circuit denied the petitions for panel rehearing, and the suggestions for rehearing *en banc* filed herein by Babo

Beazley Loe and Loe's Highport, Inc. This order is attached to this petition as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On March 4, 1999, following a trial by jury, judgments and conviction orders were entered against Babo Beazley Loe and Loe's Highport, Inc. (LHI) in the United States District Court for the Eastern District of Texas, Sherman Division. Babo Beazley Loe was sentenced to 78 months imprisonment, fined $4,738,201.12, and ordered to pay restitution jointly and severally with LHI in the amount of $1,735,130.11. LHI was placed on five years probation, and was fined $4,000,000. Thereafter, Babo Beazley Loe and LHI timely filed their notices of appeal to the United States Court of Appeals for the Fifth Circuit. On April 17, 1999, the Court of Appeals issued an opinion affirming petitioners' convictions and sentences in part, and vacating them in part. Both Babo Beazley Loe and LHI timely filed petitions for panel rehearing, and LHI filed a suggestion for rehearing *en banc,* which was joined by Babo Beazley Loe. On June 21, the Court of Appeals denied the petitions for rehearing, and the suggestion for rehearing *en banc.* In accordance with Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the date of the order denying the petitions for rehearing, and the suggestion for rehearing *en banc.*

Accordingly, this Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

> searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

Title 18, United States Code, Section 1957, provides in pertinent part:

> **§1957 Engaging in monetary transactions in property derived from specified unlawful activity**
>
> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000, and is derived from specified unlawful activity, shall be punished [as provided by law].

STATEMENT OF THE CASE

In 1946, C.D. Loe, Sr., petitioner Babo Loe's father-in-law, was given a lease by the Army Corps of Engineers on a 330 acre tract of land located on Lake Texoma, Pottsboro, in Grayson County, Texas. Over the next 50 years, his business, which began as a small bait shop and fishing camp, became what may be the largest inland marina in the United States. By 1997, Loe's Highport Marina comprised approximately 800 boat slips, boat houses, two restaurants, several bars, a convenience store, a clothing boutique, boat repair facilities, gasoline docks, and boat sales facilities.

In the Spring of 1990, Lake Texoma experienced the worst flood in its history. At its height, on May 6, 1990, water was

more than 27 feet above normal, and more than 17 feet above the height considered a flood by the Corps of Engineers. As a consequence, the property at Loe's Highport Marina was severely damaged, and claims were made against the insurers, Lexington Insurance Company, and Chubb Insurance Company.

Ultimately, Lexington paid out the policy limits (less the deductible) on a $2.5 million policy, and $638,388.34 on another policy. Chubb paid claims in the amount of $1,029,915 on its policy.

In 1994, the marina was again the victim of the weather. On May 27, 1994, the marina was hit by a windstorm/tornado that caused extensive damage. Again, claims were made against the insurer, Marine Office of America Corporation/Continental Insurance Company. Ultimately, MOAC/ Continental paid claims in the amount of $2,274,905, with certain other unresolved claims becoming the subject of litigation.

In 1995, based on a tip from a disgruntled customer, the Federal Bureau of Investigation began a criminal investigation of the marina, and its owners. This investigation led the FBI to believe that the marina and its owners were underreporting their income to the Internal Revenue Service, and were also underpaying the rental fees due the Corps of Engineers, which were based on income. In July, 1996, a search warrant was obtained by the FBI. The affidavit in support of the warrant provided evidence of the following offenses: (1) the underreporting of boat sales revenue to the Corps of Engineers; (2) the the underreporting of of boat sales revenue to IRS; (3) the failure to pay state sales tax on certain cash transactions; and (4) the failure to report the cash sales of certain boats, in violation of the Bank Secrecy Act. The warrant issued in response to the affidavit listed approximately fifty-four (54) categories of items to be seized.

On July 8, 1996, about 40 law enforcement agents executed the search warrant at the marina, and over a 14 hour period, seized approximately 300 boxes of documents, together with computers, and computer files. As a practical matter, agents seized every document that had any potential evidentiary value whatsoever. Subsequently, the Government returned approximately 130 boxes of documents, finding them to be irrelevant to the Government's investigation.

This seizure was followed by a grand jury investigation, which resulted in the indictment of Babo Beazley Loe, LHI, and others in September, 1997. Significantly, the indictment charged not only tax fraud, and fraud upon the Corps of Engineers—the offenses for which the original search warrant had been issued—but also two large conspiracies to defraud the insurors of the marina: one conspiracy based upon insurance claims made in response to the 1990 flood, the second upon claims made for the 1994 windstorm/tornado. In addition, the indictment charged ten (10) counts of money laundering.

All ten money laundering counts were nearly identical: each charged a violation of 18 U.S.C. § 1957, each named only Babo Beazley Loe and LHI as defendants, and each was based on a monetary transaction that *followed* the initial deposit of the checks received from the insurance companies for losses.

In the indictment, the money laundering charges were set out in chart form, in columns, with the final column consisting of a category labeled: SPECIFIED UNLAWFUL ACTIVITY. For each of the ten counts, this column contained nothing more than references to the mail and wire fraud statutes, as follows:[1]

18 U.S.C. § 1341

18 U.S.C. § 1343

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[1] These counts of the superseding indictment are found at Appendix C.

Prior to the first trial, Babo Beazley Loe moved to suppress the evidence that had been seized pursuant to the search warrant, on the grounds that: (1) the warrant itself was insufficient; and (2) the search of the marina far exceeded the scope of the warrant; that what had in fact occurred was a general exploratory search. This motion was denied by the district court, which found that although some of the documents seized were outside the scope of the warrant, those documents were "logical indicators" of offenses described in the affidavit in support of the warrant, and thus subject to seizure.

The petitioners also moved, both pre-trial, and at trial itself, to dismiss the money laundering counts. Petitioners contended that the general references to the mail and wire fraud statutes contained in those counts were constitutionally insufficient.[2] Specifically, the petitioners urged three interrelated grounds for dismissal: (1) "[t]he indictment fail[ed] to meet minimal constitutional standards of specificity;" (2) "the indictment fail[ed] to describe with sufficient particularity an essential element of the offense charged," this being the specified unlawful activity from which the criminal proceeds were derived; and (3) that as a consequence, "the allegations contained in the money laundering counts were so vague as to inadequately describe an essential element of the offense, [and so] invite variance and provide insufficient protections against a subsequent prosecution." These motions were denied. As a consequence, Babo Beazley Loe and LHI proceeded to trial not knowing the substantive acts of mail and wire fraud from which the laundered proceeds were allegedly derived.

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[2] Although these money laundering counts were based upon the conspiracies to defraud the insurance companies, the Government was compelled to allege *substantive* violations of the mail and wire fraud statutes because a conspiracy (18 USC § 371) to violate the mail and wire fraud statutes is *not* a specified unlawful activity under 18 USC § 1957.

At trial, during the presentation of the Government's evidence regarding the money laundering, counsel for LHI again objected to the vagueness of the charges, and the vagueness of the Government's proof:

> MR. MEADOWS: Prior to trial, Mr. Buffone, on behalf of the—on the money laundering issue, had filed a motion objecting to the fact that there were no specific, specified unlawful activities delineated in the indictment. We're now getting ready for a summary witness to testify with regard to that issue, and we still have no specific identification of the specified unlawful activity which relates to each money laundering count. We have a general description that it goes to Count 17, but the Government has proved up literally hundreds of mailings and wirings in this case. And none of which have been tied into a—in order to give the Defendants adequate notice on which to base a defense of the charge of money laundering and what specified unlawful activity a particularly mailing or wire fraud, that it relates to. And we would object on that basis and ask that the Court not allow this witness to testify.

The objection was overruled.

Following their convictions, both Babo Beazley Loe and LHI appealed, contesting both the legality of the search, and the validity of the money laundering counts.

A. The search

In her appeal, Babo Beazley Loe argued that

> This is the rare case in which the breadth of a search and seizure was such that a forbidden general exploratory search under the Fourth Amendment occurred. Thousands of documents *not* embraced by the allegations of criminal activity supporting probable cause for issuance of the warrant were seized, including the altered documents submitted to the insurance companies in both trials. Much evidence in both trials, and all summary

> testimony in the insurance fraud cases, compared search documents with original invoices. Attorney client communictions and personal files were also indiscriminately seized.

The Court of Appeals disagreed, finding that

> [w]hile the wisdom of including such a broad array of documents in the warrant is questionable, we are unprepared to find the officers' reliance on the warrant unreasonable. The district court found that documents such as real estate and insurance files were logical indicators of LHI's gross fixed assets. We agree. A company's gross fixed assets may indicate a failure to report income to the IRS and Corps, as well as Appellants' knowledge of the unreported income. The twenty-two-page affidavit provided ample indication of the Loes' failure to report income to the IRS and Corps. Although the warrant authorized seizure of a vast array of documents, the crimes alleged in the affidavit could reasonably be viewed as requiring a search of this magnitude. The fifty-year history of the marina and the scope of the operations under investigation lend additional support to the breadth of the search warrant. Morevoer, the warrant expressly limited the search to a portion of the marina's business premises, and nothing was seized from the Loes' residence. The Loes point to the FBI's prompt return of the 130 boxes of irrelevant documents as evidence of the warrant's overbreadth. However, this is merely proof that the proper breadth of a warrant is always clearer after the fact.

(Appendix A, p. 16a).

Babo Beazley Loe submits that opinion of Court of Appeals has improperly expanded the "plain view" doctrine, by creating a new category of items that fall within the exception: items that are "logical indicators" of the offenses being investigated. This Court has never authorized such seizures, and in fact, such seizures are contrary to the

decisions of this Court. This is the first important federal question presented in this petition.

B. The money laundering counts

With regard to the money laundering counts, LHI and Babo Beazley Loe contended on appeal that the § 1957 counts in the indictment were defective *per se*, because the counts failed to describe precisely which act of the hundreds of acts of mail and wire fraud constituted the specified unlawful activity at issue. Further, they argued that the indictment in this case permitted the jury to return a less-than-unanimous verdict, because it remained unknown whether the jury was unanimous with regard to the specified unlawful activity supporting each separate count of money laundering—*i.e.*, did six jurors believe that it was mail fraud, and six believe that it was wire fraud?

The Court of Appeals rejected both arguments, finding that

> [petitioners'] argument misinterprets the term, "specified unlawful activity." This term does not imply that the indictment must list a specific unlawful act that is the source of the money. Instead, the statute proposes "specified unlawful activity" as a term of art. (footnote omitted). A specified unlawful activity is one of a *set* of federal crimes listed in 18 U.S.C.A. § 1956(c)(7). Section 1957 merely requires money to be derived from a particular *set* of federal crimes. It does not require the indictment to specify which unlawful activity generated the funds in question. (Appendix A, p. 28a) (emphasis added).

After finding the indictment sufficient, the Court of Appeals added: "Nor is jury unanimity regarding the specified unlawful activity required. Our holding in *United States v. Short,* [181 F.3d 620 (5th Cir.1999)] affirms this conclusion."

LHI submits that jury unanimity regarding the specified unlawful activity *is* required by the caselaw of this Court, and that these conclusions by the Court of Appeals present the second important federal question in this petition.

REASONS FOR GRANTING THE PETITION

I. WHETHER IT IS OBJECTIVELY UNREASONABLE FOR AN OFFICER TO RELY ON A SEARCH WARRANT AUTHORIZING THE SEIZURE OF BROAD CATEGORIES OF DOCUMENTS UNRELATED TO, BUT "LOGICAL INDICATORS OF" THE CRIMES DESCRIBED IN THE AFFIDAVIT IN SUPPORT OF THE WARRANT.

A. The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With The Relevant Decisions Of This Court.

As the Court of Appeals acknowledged, the search warrant issued in this case authorized the seizure of a "broad" or "vast array" of documents.[3] And, as both the district court, and the Court of Appeals recognized, this "broad array" of documents included many that on their face were not related to the offenses described in the affidavit sworn out in support of the warrant. Such unrelated documents included categories such as real estate, and insurance files. These files, and similiar ones, are the ones from which the Government obtained the documents it subsequently used to prosecute LHI and Babo Beazley Loe for defrauding insurance companies.

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[3] The Court of Appeals found that the warrant did not violate the particularity requirement of the Fourth Amendment, because it divided this "vast array" into approximately 54 categories of evidence.

In *United States v. Leon*, 468 U.S. 897 (1984), this Court delineated a variety of circumstances under which it is not objectively reasonable for an officer to rely on a search warrant issued by a neutral and detached magistrate. One such circumstance is when the nature and scope of the items described in the warrant is unsupported by the affidavit sworn out to obtain the warrant. *Leon*, at 922-923.

Here, the district court and the Court of Appeals were unable to find a direct connection between the crimes described in the affidavit, and certain groups of documents, such as the real estate and insurance files. They were, however, able to find an indirect connection, by determining "that documents such as real estate and insurance files were logical indicators of LHI's gross fixed assets." (Appendix A, p. 16a). The courts reasoned that in turn, such "gross fixed assets *may* indicate a failure to report income . . . . . as well as . . . . . knowledge of the unreported income." (Appendix A, p. 16a).

In short, the Court of Appeals determined that the seizure of an item described in a warrant need not be supported by a showing that there was a fair probability that it constituted evidence of a crime. Instead, the fact that documents may have evidentiary value is now sufficient, if that evidentiary value is a "logical indicator" of the crime being investigated. This holding is contrary to the requirement that there be a nexus between the item to be seized, and the criminal behavior being investigated. *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

In the investigation of financial crimes, all documents and data relating to money, property, and business transactions are arguably "logical indicators" of something that ultimately can be connected to such offenses. If the exception created by the Court of Appeals is permitted to stand, it will swallow the rule. This Court should grant certiorari to consider the

important federal question of whether it is legally sufficient for an item to be a "logical indicator" of a crime.

II. WHETHER, IN A PROSECUTION FOR MONEY LAUNDERING BROUGHT UNDER 18 U.S.C. § 1957, THERE MUST BE JURY UNANIMITY REGARDING THE SPECIFIED UNLAWFUL ACTIVITY FROM WHICH THE LAUNDERED FUNDS WERE DERIVED?

A. The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With The Relevant Decisions Of This Court.

In *United States v. Richardson*, 526 U.S. 813 (1999), this Court held that "federal crimes are made up of factual elements . . . ," and that "[c]alling a particular kind of fact an 'element' carries certain legal consequences." *Richardson,* 526 U.S. at 817, citing *Almendarez-Torres v. United States*, 523 U.S. 224, 229 (1998).

One consequence is that a federal jury cannot convict a defendant of a federal crime unless and until that jury *unanimously* finds that the Government has proved each and every factual element[4] of the federal crime beyond a reasonable doubt. *Richardson, id.*, citing *Johnson v. Louisiana*, 406 U.S. 356, 369-371 (1972), *Andres v. United States*, 333 U.S. 740 (1948), and Fed.R.Crim.Proc.31(a).

One of the factual elements of 18 USC § 1957 is that the "property" involved in the monetary transaction *must in fact be derived from specified unlawful activity.* Every Court of Appeals to address the question has so held. *United States v. Leahy,* 82 F.3d 624, 635 (5th Cir.1996); *United States v.*

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[4] *See also Schad v. Arizona*, 501 U.S. 624 (1991), which discusses the difference between an *element* of an offense, and the *means* of satisfying that element of the offense.

Sokolow, 91 F.3d 396 (3rd Cir.1996), *cert. denied*, 519 U.S. 1116 (1997); 36 American Criminal Law Rev. 913 (1999)—"The Act criminalizes only those transactions that actually involve the proceeds of a 'specified unlawful activity.'"(footnote omitted). In fact, as can be seen from the jury instructions given at the trial of this matter, the district court told the jury that the fourth *element* of money laundering was as follows:

> Fourth: The criminally derived property must also, in fact, have been derived from a specified unlawful activity; . . .

Thus, as a matter of logic, and the law, at the trial in this proceeding, there had to be juror unanimity regarding the property's derivation from specified unlawful activity.

In this case, however, the court's jury instruction[5] permitted the jury to convict LHI and Babo Beazley Loe of money laundering even though there may have been significant disagreement among the jurors as to whether the proceeds were derived from mail fraud, or from wire fraud, or both; and even though there may have been significant disagreement as to which precisely which acts of mail fraud, or wire fraud, constituted the source of the proceeds.

In its resolution of the question, which had heretofore never been addressed by any court of appeals, the Court of Appeals for the Fifth Circuit concluded that in money laundering cases under § 1957, the Sixth Amendment's

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[5] In its charge to the jury, the district court defined "specified unlawful activity" as follows: "The term specified unlawful activity includes violations of the mail fraud statute, 18 U.S.C., Section 1341, and the wire fraud statute, 18 U.S.C. Section 1343. It does not include a violation of Title 18, United States Code Section 371, the conspiracy statute. I have previously instructed you on the elements of these offenses and you should apply those instructions in evaluating this element of the money laundering offenses."

requirement of unanimity reaches only the *fact* of derivation from specified unlawful activity, *i.e.*, only to the question of whether the money was actually derived from the "set" of crimes embraced by the term "specified unlawful activity." In the eyes of the Court of Appeals, jury unanimity as to the "category" of crime, (*i.e.*, mail fraud, wire fraud) creating the illicit funds is not required—much less jury unanimity as to the specific offense within a category. In reaching these conclusions, the Court of Appeals did not even so much as mention this Court's opinion in *Richardson*. This was error.

In *Richardson*, this Court drew a clear distinction between the means used to commit an element of a crime, which do not require jury unanimity, and the elements themselves—which do. In determining the category into which the Court would place the statute under consideration in *Richardson*, 21 U.S.C. § 848—the continuing criminal enterprise statute—the Court looked to three things: (1) the language of the statute; (2) the breadth of the statute; and (3) the Court's settled policy against interpreting a statute in a way that engenders constitutional issues, if a reasonable alternative interpretation poses no constitutional questions.

If 18 U.S.C. § 1957 is examined in light of these three factors, it is plain that the Court of Appeals erred. The term "specified unlawful activity" is not a "term of art," it is a congressional limitation on the types of activity that can produce "dirty" money, *i.e.*, money that will subject the persons conducting financial transactions with it to federal prosecution. More importantly, a specified unlawful activity is in fact a "predicate offense"in a money laundering prosecution. Before convicting a defendant of a violation of § 1957, the jury must find, beyond a reasonable doubt, that an offense listed in § 1956(c)(7) has been committed, *and that the offense gave rise to the funds at issue in the charged transaction*. If unanimity as to the source of the funds is not required, then there cannot, in fact, ever be true unanimity as to the money laundering transaction itself.

Further, given the original breadth of the statute, which has been repeatedly criticized for criminalizing routine comercial transactions,[6] the interpretation given it by the Court of Appeals for the Fifth Circuit creates precisely the types of dangers warned against in *Richardson.* Permitting a jury to avoid discussion of which specified unlawful activity it believes the money came from "will cover up wide disagreement about just what the defendant did, or did not do." *Richardson,* at 819. Further, if a jury is not required to determine which specified unlawful activity generated the funds that were allegedly laundered, the there is the risk that a jury will conclude that whether there is smoke (some type of underlying criminal activity), there must be fire—money laundering.

The money laundering statutes now play a very important role in federal prosecutions. The decision of the Court of Appeals for the Fifth Circuit in this case is significant for that reason alone—it represents the first appellate interpretation of this aspect of the money laundering statutes. More critical, however, is the fact that the result reached by the Court of Appeals will undoubtedly result in the even greater use of the money laundering statutes, because the Court of Appeals has interpreted them in a way that dramatically lowers the Government's burden of proof. Certiorari should be granted to review this important federal question.

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[6] *See e.g.*, "A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes," 37 CATH. U.L. Rev. 489 (1988), John K. Villa.

CONCLUSION

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 00-40690

No. 99-40454, Consolidated with Case No. 99-40495,
Consolidated with Case No. 99-41470, Consolidated

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CORNELIUS DEWITTE LOE, JR., also known as C.D. LOE; BABO BEAZLEY LOE; LOE'S HIGHPORT, INC.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOE'S HIGHPORT, INC.; BABO BEAZLEY LOE,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BABO BEAZLEY LOE; LOE'S HIGHPORT, INC.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LOE'S HIGHPORT, INC.,
BABO BEAZLEY LOE;
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas. 4:97-CR-71-2.
Paul N. Brown, U.S. District Judge.

April 17, 2001, Decided

OPINION BY: PATRICK E. HIGGINBOTHAM

OPINION

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

Appellants seek reversal of their convictions for conspiracy, wire fraud, mail fraud, tax fraud, and money laundering. They further challenge the sentence imposed by the district court. We are unpersuaded by the majority of their numerous assertions of error. However, as the evidence was insufficient to support a conviction on three of the money laundering charges, we affirm in part, reverse in part, and remand for resentencing.

I.

Loe's Highport, Inc. operated Loe's Highport Marina, reputedly the largest inland marina in the world. Situated on Lake Texoma, the marina contains hundreds of boat slips, facilities for the sale of boats, a disco, a corporate office, and other facilities. Appellants Cornelius and Babo Loe ran the marina, which was located on property leased from the U.S. Corps of Engineers. Under the lease, the Corps was to receive a percentage of marina revenues.

In 1990, the lake experienced the greatest flood in its history. Appellants submitted millions of dollars in claims to their insurers, Lexington Insurance Company and Chubb Insurance Company. In the wake of damage caused by a tornado in 1994, Appellants submitted additional claims to Continental Insurance Corporation.

In 1995, a disgruntled customer of LHI contacted the Federal Bureau of Investigations, claiming to be the victim of fraud. Further investigation by the FBI indicated that Appellants were underreporting boat sales to the Internal Revenue Service and the Corps. The FBI obtained a search warrant and seized thousands of documents from the marina.

On September 11, 1997, a grand jury sitting in the Eastern District of Texas indicted Appellants and three other individuals[1] on various conspiracy, tax fraud, wire fraud, mail fraud, and money laundering charges. A 1998 superseding indictment charged Appellants on thirty-one counts.[2] The Government alleged that Appellants failed to report millions in boat sales to the IRS and the Corps. Appellants were also accused of having defrauded their insurers, who collectively suffered millions of dollars in damage due to Appellants' submission of altered or fabricated invoices for losses and mitigation costs. The indictment alleged that Appellants conspired to undertake these unlawful activities, and that they used the proceeds of the fraud to acquire various forms of property, including a house in Florida.

The district court severed the counts and held two trials. Appellants were each convicted on some counts and acquitted

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[1] Andrew Scott Howard and Roger Foltz were acquitted. Henry Blume Loe was granted a mistrial; he was convicted in a subsequent trial.

[2] The various counts of the indictment did not uniformly encompass every defendant. In addition to the thirty-one substantive counts, the superseding indictment contained a forfeiture provision.

on others. The district court sentenced Cornelius and Babo Loe to jail and required the Loes and LHI to pay large fines and restitution damages.

II. CORNELIUS LOE

A.

Cornelius Loe argues that his conspiracy conviction should be reversed, asserting that his prosecution was barred by the statute of limitations. The government alleged only one act in furtherance of the conspiracy that fell within the five-year statute of limitations.[3] Cornelius Loe argues that the overt act alleged in the indictment could not support a conviction.

The indictment alleged that the defendants conspired to commit the following acts: "To devise and intend to devise a scheme and artifice to defraud insurance companies and to obtain money and property by means of false and fraudulent pretenses and promises and [to do so in violation of 18 U.S.C.A. § 1341 (mail fraud) and in violation of 18 U.S.C.A. § 1343 (wire fraud)]." Given the statute of limitations, the Government had to prove an act in furtherance of the conspiracy after September 11, 1992. The indictment alleged: "On or about December, 1992, BABO BEAZLEY LOE, C.D. LOE, JR. and LOE's HIGHPORT, INC. effected a settlement of the lawsuit and received a portion of the fraudulently obtained insurance proceeds."

These allegations arose out of the following circumstances: In July 1991, the Loes' insurer, Lexington, interpleaded $638,388.34 in state court to determine the portion of proceeds due to the Loes and one of their tenants, David Hull. Hull apparently had refused to endorse Lexington insurance checks that he received, checks made out jointly to him and

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[3] *See* 18 U.S.C.A. § 3282 (2000) (articulating a five-year limitations period).

the Loes.[4] According to the Government, the vast majority of the interpleaded funds resulted from the insurance fraud undertaken by the Loes. On March 27, 1991, the state court ordered that $624,867.79[5] be paid to the Loes and that $15,520.55 be retained in the court registry. The court's calculation was incorrect, as these amounts sum to $640,388.34. The investment firm handling the proceeds consequently paid the Loes only $622,867.79. By subsequent order, the court awarded Hull $13,520.55, leaving $2,000 in the account. All of these events occurred before September 11, 1992.

Meanwhile, the Loes sued Hull over a debt. In November or December, 1992, Hull's attorney and the Loes' attorney negotiated a possible settlement of litigation between the two parties. Hull's attorney proposed a disposition of the funds remaining in the registry account from this and earlier interpleader actions. Following this conversation, Hull's attorney asked the court to disburse $17,500 from an earlier interpleader to the Loes, plus the $2,000 remaining by mistake, and to disburse the remainder to Hull. The motion explained that the $17,500 was actually owed to Hull, but should be given to the Loes to settle the debt litigation. The court entered an order of disbursement on February 10, 1993.[6]

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[4] Hull had been the lessee of a restaurant located on the marina. Cornelius Loe allegedly attempted to enlist Hull in the conspiracy. In the wake of Hull's refusal to participate, the Loes evicted him from the premises and indicated that the restaurant would not be reopened. Litigation ensued.

[5] Each of these sums was paid with interest; the amounts shown reflect only principal.

[6] The motion made clear that LHI was entitled to the $2,000 as a result of the prior mistaken order. The court's subsequent order of disbursement specifically included a $2,000 disbursement to Babo Loe as trustee of LHI.

Based on these facts, Cornelius Loe contends, first, that the $2,000 payment was merely the "result" of the conspiracy, and not its object. He argues that the object of the conspiracy was defrauding the insurance company. As the fraud was completed outside the limitations period, Cornelius argues that the Government can not demonstrate the commission of an overt act in furtherance of the conspiratorial agreement.[7]

We are unpersuaded by Loe's argument. Receipt of the money was an object, and not merely a collateral result, of the conspiracy. The indictment so alleged, and a rational trier of fact could have arrived at this conclusion.

Our holding in *United States v. Girard* [8] is instructive. In Girard, we reversed the dismissal of an indictment, which the district court had found barred by the statute of limitations. The defendant in that case had allegedly conspired to defraud the government by rigging contract bids. Only the final payment was within the statute of limitations; the bid rigging had occurred long before.[9] We held that the receipt of the money was properly alleged as an object of the conspiracy, which did not end until the last payment was made. Girard's overt act was the acceptance and retention of the payment.[10] We made the common sense observation that the object of the conspiracy was not the making of rigged bids itself, but the subsequent receipt of the proceeds.[11] Similarly, receipt of the

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[7] *See Grunewald v. United States*, 353 U.S. 391, 396-97, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957).

[8] 744 F.2d 1170 (5th Cir. 1984).

[9] *Girard*, 744 F.2d at 1171.

[10] *Id.* at 1173.

[11] *Id. at 1172.* The cases cited by Cornelius Loe are consistent with this reasoning, yet are factually distinguishable. In *United States v. Colon-Munoz*, 192 F.3d 210, 227-29 (1st Cir. 1999), the court held that obtaining specified property was the object of the conspiracy. Following the purchase of the property, a conspirator made payments on a loan financing the purchase. The court correctly concluded that these later actions were

$2,000 in this case constituted an overt act falling within the limitations period.

Cornelius Loe also contends that actions taken by Hull's attorney are not actions taken by conspirators and therefore cannot be actions taken in furtherance of a conspiracy.[12] This argument fails, first, because receipt of the money by the Loes was an overt act within the scope of the conspiracy. Moreover, a rational jury could conclude that the Loes, as parties to the settlement agreement with Hull, took some overt action in connection with the terms of the agreement.

Third, Cornelius Loe argues that, even if the $2,000 payment made in February 1993 was an act in furtherance of the conspiracy, the indictment failed to allege this act. Loe notes that the indictment only alleged the 1992 settlement. In assessing whether a conspiracy conviction under 18 U.S.C. § 371 withstands a statute of limitations challenge, this Court has held that the overt acts alleged in the indictment and proved at trial mark the duration of the conspiracy.[13] Proof of an unalleged act can not surmount the statute of limitations bar.

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not undertaken in furtherance of the conspiracy. *See id.* In *United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976), we found that acts taken after false statements were made to the government were not part of a conspiracy. We emphasized that defendants were charged with conspiring to violate 18 U.S.C. § 1001, noting that the object of this offense was the making of false statements itself. We contrasted that offense with conspiracy to defraud the government. *See id.* at 927-28. As the conspiracy at issue in this case involves wire and mail fraud, it is distinguishable from Davis.

[12] *See United States v. Manges*, 110 F.3d 1162, 1170 (5th Cir. 1997) (holding that, where a conspirator did not mail the letter implicated in mail fraud, the mailing by another person was insufficient to support conviction).

[13] *See Davis*, 533 F.2d at 929.-

Loe's argument fails, however, because the motion to disburse the $2,000 was itself part of the settlement, which was negotiated in November or December 1992. The indictment indicated that Appellants had "effected a settlement" and "received a portion of the fraudulently obtained insurance proceeds." The broad language of the indictment was sufficient to encompass the Loes' receipt of the $2,000.

Finally, Cornelius Loe contends that the $2,000 is "interest" from the interpled funds and consequently not the insurer's money. This argument is creative advocacy, but wrong. The $2,000 unquestionably represented the remainder of the principal originally registered with the court.[14]

B.

Cornelius Loe further contends that the district court failed to properly instruct the jury regarding the statute of limitations in its aiding and abetting instruction for the conspiracy count. Count 17 of the indictment charged Appellants with (1) conspiring to violate the mail and wire fraud statutes, and (2) aiding and abetting this conspiracy, violating 18 U.S.C. § 2. As we understand his argument, Cornelius Loe asserts that it is unclear from the verdict whether the jury convicted him of aiding and abetting or for his role as a member of the conspiracy itself. He argues that the actus reus of aiding and abetting must itself occur within the limitations period. Where the aidor-abettor's acts fall outside this period, it is irrelevant that the overt acts taken by the conspirators were not time-barred. According to Cornelius Loe, the jury should have been informed of this distinction.

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[14] Babo Loe adopts Cornelius Loe's arguments. For the reasons given above, they also fail. Indeed, Babo Loe's case is much weaker, as the $2,000 check was issued in her name.

We doubt the validity of Loe's proposition. An aidor-abettor is guilty in a derivative sense; his guilt is contingent on the acts of another.[15] Courts have recognized this relationship by holding that aiding and abetting is governed by the statute of limitations applicable to the predicate offense.[16] One could reasonably conclude that, as long as the acts of the conspirator were not time-barred, it is of no moment that the aidor-abettor's conduct fell outside the limitations period. We need not decide this, however, as Cornelius Loe was a party to the Hull litigation. A rational jury could have found that any acts of aiding and abetting committed by Cornelius Loe fell within the five-year limitations period.

Even if we were to accept Cornelius Loe's argument, however, the jury instructions sufficiently informed the jury that the conspiracy limitations period applied to the aiding and abetting offense. The court admonished the jury to consider the "instructions as a whole" and to consider the aiding and abetting instructions "together" with the conspiracy instructions. We do not find that the court abused its discretion in incorporating the statute of limitations by reference.[17]

C.

Cornelius Loe also challenges the sufficiency of the evidence supporting his conviction under Count 17. The applicable standard of review requires us to determine

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[15] *See* 18 U.S.C.A. § 2 (2000); *United States v. Campbell*, 426 F.2d 547, 553 (2d Cir. 1970) ("18 U.S.C. § 2 does not define a crime; rather it makes punishable as a principal one who aids or abets the commission of a substantive crime.").

[16] *See United States v. Musacchia*, 900 F.2d 493, 499 (2d Cir. 1990), vacated on other grounds, 955 F.2d 3 (2d Cir. 1991); *Campbell*, 426 F.2d at 553; *United States v. Gressett*, 773 F. Supp. 270, 281 (D. Kan. 1991).

[17] *See United States v. Pennington*, 20 F.3d 593, 600 (5th Cir. 1994) (reviewing a court's refusal to submit a proposed jury instruction for abuse of discretion).

whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt.[18] The voluminous evidence in the record affirms that Loe's challenge is meritless. We decline Loe's invitation to re-weigh the credibility of the witnesses.[19]

D.

Loe challenges the jury instructions for the conspiracy, mail fraud, and wire fraud counts based on the court's failure to define "materiality." Materiality is an element of the offenses of mail and wire fraud, and must be included in the jury charge.[20] In this case, the court instructed the jury that the fraud must be "material;" the only alleged error is its failure to define the term.[21]

We review a trial court's refusal to include a requested jury instruction for abuse of discretion, according the trial court "substantial latitude in formulating the charge." [22] We find reversible error only where the requested instruction is substantially correct; the actual charge given the jury did not substantially cover the content of the proposed instruc-

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[18] *See United States v. Mergerson*, 4 F.3d 337, 341 (5th Cir. 1993).

[19] *See United States v. Bailey*, 444 U.S. 394, 414-15, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980) (stating that it is for the jury, and not the court, to determine the credibility of witnesses).

[20] *See Neder v. United States*, 527 U.S. 1, 25, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999); *United States v. Pettigrew*, 77 F.3d 1500, 1510-11 (5th Cir. 1996).

[21] The court instructed the jury in the following manner:

> For purposes of both the mail and wire fraud statutes, a "scheme to defraud" includes any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. A representation may be "false" when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud.

[22] *Pettigrew*, 77 F.3d at 1510.

tion; and where the omission of the proposed instruction would "seriously impair the defendant's ability to present a defense." [23]

The court only deviated from the instruction proposed by Appellants in refusing to define "material."[24] We have held that failure to charge materiality to the jury requires reversal, without considering whether the error was harmless.[25] However, we have not found that failure to define materiality compels the same response. This is not a case where the actual instructions failed to "substantially cover the content of the proposed instruction."[26] Given the evidence presented at trial, which demonstrated that Appellants' fraud increased the insurers' payments by millions of dollars, the court's failure to define "material" was nothing more than harmless error.[27]

III. BABO LOE

A.

Babo Loe contends that she can not be convicted of conspiracy on counts 1, 17, and 18, which alleged conspiracy to defraud the government and conspiracy to commit mail and wire fraud. She argues, first, that being convicted of conspiring with LHI, which she owned, is equivalent to being convicted of conspiring with herself. Second, she notes that,

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[23] *Id.*

[24] The proposed mail fraud instruction included the following definition of "materiality": "A statement is material if it has a natural tendency to influence, or is capable of influencing a decision by the party to whom the representation is made." In contrast, the proposed wire fraud instruction did not include a definition of materiality.

[25] *Pettigrew*, 77 F.3d at 1511.

[26] *Id.* at 1510.

[27] *See United States v. Davis*, 226 F.3d 346, 358-59 (5th Cir. 2000) (upholding a jury instruction that failed to define "materiality"). Babo Loe adopts Cornelius Loe's argument regarding the jury instructions. The preceding analysis applies equally to her case.

with the exception of Cornelius Loe, the other alleged co-conspirators were acquitted. She argues that she can not be convicted of conspiracy if the other co-conspirators were acquitted. Similarly, Babo Loe asserts that, if the evidence was insufficient to support Cornelius Loe's conviction under count 17, her conviction under that count also can not stand.

Her argument is without foundation. This Court has repeatedly held that the acquittal of all other co-conspirators does not bar conviction for conspiracy.[28] We therefore need not address Babo Loe's assertion that she can not be convicted of conspiring with LHI.[29]

B.

Babo Loe also contends that the district court erred in denying her motion to suppress evidence seized pursuant to the search of the marina. As we understand her argument, she asserts that all of the evidence should be suppressed because of defects in the warrant and its execution. She contends that the warrant was overbroad and that the FBI exceeded the scope of the warrant in conducting its search.

The affidavit upon which the warrant was based provided evidence that the Loes (1) had underreported boat sales revenue to the Corps; (2) had underreported boat sales revenue to the IRS; (3) had not paid state sales tax on cash cover charges obtained from bars and restaurants located on the marina; and (4) did not report the cash sale of various boats, in violation of the Bank Secrecy Act.[30] The warrant

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[28] *See United States v. Zuniga-Salinas*, 952 F.2d 876, 877-78 (5th Cir. 1992) (en banc); *United States v. Bermea*, 30 F.3d 1539, 1554 (5th Cir. 1994).

[29] As noted above, the evidence was sufficient to support Cornelius Loe's conspiracy conviction under count 17. Moreover, counts 1 and 18 involved acquitted conspirators other than LHI. Babo Loe's arguments regarding LHI are consequently irrelevant.

[30] *See* 31 U.S.C.A. §§ 5312(a)(2)(T), 5313 (2000).

authorized the search of the following areas: two offices on level one of the corporate office building; all of level two; the storage area of level three; a tan mobile home designated, "Loe's Highport Yacht Sales"; and the safes and vaults of the Pompano's Club and Clipper Bar. An attachment to the search warrant listed approximately fifty-four categories of items to be seized. The warrant did not authorize a search of the Loe's residence, which was located on the third floor of the corporate office building.

In reviewing the district court's ruling on a motion to suppress evidence, we review factual findings for clear error.[31] We review de novo the court's legal conclusions regarding the constitutionality of law enforcement action, sufficiency of the warrant, and the reasonableness of an officer's reliance on a warrant.[32]

We address a Fourth Amendment challenge to a seizure conducted pursuant to a search warrant by asking, first, whether the seizure falls within the good-faith exception to the exclusionary rule.[33] Under the good-faith exception, where a warrant was based on an affidavit which was insufficient to establish probable cause, the evidence obtained is still admissible if law enforcement officials acted in "objectively reasonable good-faith reliance upon a search warrant."[34] If the good-faith exception applies, we need not examine whether the warrant was supported by probable cause.[35]

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[31] *See Davis*, 226 F.3d at 350.

[32] *See id.*

[33] *See United States v. Davis*, 226 F.3d 346, 350 (5th Cir. 2000); *see also United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

[34] *Davis*, 226 F.3d at 351 (quoting *United States v. Shugart*, 117 F.3d 838, 843 (5th Cir. 1997)).

[35] *Davis*, 226 F.3d at 351.

When officers execute a warrant in a manner that offends the Fourth Amendment, however, there is no "objectively reasonable good-faith reliance." Evidence which falls outside the scope of the warrant normally must be suppressed.[36] However, two exceptions apply. First, items of an "incriminatory character" which are found in the course of a legal search, yet which were not described in the search warrant, may be seized. Second, officers may seize property which is not described in the warrant if the property exhibits a "sufficient nexus" to the crime under investigation.[37] The Fourth Amendment does not countenance, however, a "general, exploratory search through personal belongings."[38]

Although the bulk of her arguments address the sufficiency of the warrant itself, Babo Loe contends that the fourteen-hour search of the marina exceeded the scope of the warrant. Agents seized several hundred boxes of documents, of which 130 boxes were subsequently returned as irrelevant to the Government's investigation. Babo Loe fails to cite specific pieces of evidence that were seized outside the scope of the warrant. While Babo Loe argued to the district court that a variety of broad categories of evidence were seized outside the scope of the warrant,[39] her brief does not indicate whether

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[36] *See Horton v. California*, 496 U.S. 128, 140, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990).

[37] *See Creamer v. Porter*, 754 F.2d 1311, 1318 (5th Cir. 1985).

[38] *Id.*

[39] The district court examined the following categories of evidence which Babo Loe objected to as falling outside the scope of the warrant: (1) various date books, organizers, calendars, attendance lists, and Rolodexes; (2) entirely personal notes and files; (3) litigation and other legal files, including files relating to the Hull litigation; (4) state and federal labor law files; (5) trust and estate planning files; (6) gift and estate tax files; (7) files on property damage; (8) medical and health insurance files; (9) life insurance files; (10) automobile insurance files; (11) other insurance files unrelated to property insurance; (12) maps and floor plans; and (13) an audiotape. The district court found that, while

she is reiterating those arguments on appeal. On appeal, she refers only to the seizure of estate planning files, the Loes' personal files, whole computers and computer files and litigation files.

Although we are troubled by the scope of the search conducted, we are unprepared to say that the items seized should be suppressed on the basis that they exceeded the terms of the warrant. The warrant specifically authorized the seizure of computers and computer files. Although the warrant did not refer to estate planning files, it authorized, for example, the seizure of files relating to any and all wire transfers and information relating to stock/brokerage accounts. Without specifics, we are unable to evaluate the merits of Babo Loe's contention that "personal files" were seized. Finally, while the warrant did not expressly authorize the seizure of litigation files, certain non-privileged documents contained within those files may have fallen within the scope of the warrant. Again, without specifics, we are unable to conclude that any given file was seized improperly.

Babo Loe also complains of the extensive search of the Loe residence. The warrant authorized a search of the third-floor storage area. Because the elevator was either locked or inoperable, agents could only access the storage area through the Loes' residence, which was also on the third floor. Despite the warrant's failure to authorize a search of the residence, the Government argues that a "protective sweep" was necessary.[40] The FBI knew prior to the search that the

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some of the preceding categories of items appeared to fall outside the warrant's scope and did not demonstrate a sufficient nexus to the crimes investigated, the officers did not act in "blatant disregard of the search warrant."

[40] A protective sweep is justified when the searching officer reasonably believed "that the area swept harbored an individual posing a danger to the officer or others." *Maryland v. Buie*, 494 U.S. 325, 327, 108 L. Ed. 2d 276, 110 S. Ct. 1093 (1990).

Loes were registered gun owners, and a search of their persons did not reveal firearms. Although examining drawers and closets may or may not have been quick and limited—and therefore within the scope of a protective sweep [41]—we need not address this issue. No items from the residence were seized, nor was anything from the residence used as evidence at trial.

Babo Loe further argues that the warrant itself was overbroad because it authorized the seizure of many categories of documents unrelated to the crimes described in the affidavit. The good-faith exception articulated above does not apply where there is a discrepancy between the assertions in the affidavit and the scope of the warrant sufficient to make reliance on the warrant unreasonable.[42]

While the wisdom of including such a broad array of documents in the warrant is questionable, we are unprepared to find the officers' reliance on the warrant unreasonable. The district court found that documents such as real estate and insurance files were logical indicators of LHI's gross fixed assets. We agree. A company's gross fixed assets may indicate a failure to report income to the IRS and Corps, as well as Appellants' knowledge of the unreported income. The twenty-two-page affidavit provided ample indication of

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[41] *See id.* ("A 'protective sweep' is a quick and limited search of premises . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding."). But see *United States v. Hernandez*, 941 F.2d 133, 135-38 (2d Cir. 1991) (extending the proper scope of a protective sweep to a search for weapons that the arrestee could easily reach).

[42] *See United States v. Davis*, 226 F.3d 346, 352 (5th Cir. 2000); *United States v. Cherna*, 184 F.3d 403, 409-10 (5th Cir. 1999). Babo Loe does not invoke the other bases for not applying the good-faith exception. *See Cherna*, 184 F.3d at 407-08. Given the specificity of the warrant, which lists fifty-four categories of evidence, we find that the warrant did not violate the particularity requirement of the Fourth Amendment. *See United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir. 1995).

the Loes' failure to report income to the IRS and Corps. Although the warrant authorized seizure of a vast array of documents, the crimes alleged in the affidavit could reasonably be viewed as requiring a search of this magnitude. The fifty-year history of the marina and the scope of the operations under investigation lend additional support to the breadth of the search warrant. Moreover, the warrant expressly limited the search to a portion of the marina's business premises, and nothing was seized from the Loes' residence.[43] The Loes point to the FBI's prompt return of the 130 boxes of irrelevant documents as evidence of the warrant's overbreadth. However, this is merely proof that the proper breadth of a warrant is always clearer after the fact.

We find only that the agents' reliance on the warrant was not objectively unreasonable and did not indicate bad faith.[44]

C.

Babo Loe argues that the district court improperly applied the Sentencing Guidelines in determining her sentence for money laundering. She contends that fraud was the "essence" of her offense. Accordingly, Babo Loe argues that she should have been sentenced under the fraud guidelines, not the money laundering guidelines.

This Court reviews a court's legal interpretations of the Guidelines de novo.[45] A sentencing court's refusal to depart

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[43] The search in this case is therefore distinguishable from the "all records" search discussed in *United States v. Humphrey*, 104 F.3d 65 (5th Cir. 1997). In Humphrey, we recognized that the Fourth Amendment requires "closer scrutiny of an all records search of a residence," noting that a search of this nature would only be upheld in "extreme cases." See *id.* at 69 & n.2.

[44] Cornelius Loe adopts Babo Loe's Fourth Amendment arguments. For the reasons given above, these arguments also fail as applied to Cornelius Loe.

[45] *See United States v. Barbontin*, 907 F.2d 1494, 1497 (5th Cir. 1990).

from the applicable guideline is unreviewable, however, unless the court mistakenly believed that it lacked the authority to grant such a departure.[46] The district court here was aware of its power to grant a downward departure.

Babo Loe attempts to escape this limitation on our power to review sentencing decisions. She asserts that a court's application of a guideline range is a purely legal interpretation, meriting de novo review. We find no error in the sentencing court's decision to apply section 2S.1 of the Guidelines to Babo Loe's violation of 18 U.S.C. § 1957. Appendix A of the Guidelines indicates that guideline section 2S1.2 corresponds with violations of 18 U.S.C. § 1957.[47] We would not hesitate to apply de novo review and correct a court's misapprehension of this elementary component of the sentencing architecture constructed by the Guidelines. However, where a court finds that the facts in a section 1957 case are sufficiently atypical as to warrant the application of a lower guideline range, its decision constitutes a downward departure.[48] The court in such an instance does not misinterpret the Guidelines by failing to apply section 2S1.2; it exercises its discretion under the facts of that case.[49] The sentencing court's refusal to apply a different set of

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[46] *See United States v. Powers*, 168 F.3d 741, 753 (5th Cir. 1999).

[47] *See U.S.S.G. App. A. (2000)*; U.S.S.G. § 1B1.2(a); U.S.S.G. § 2S1.2, cmt.

[48] *See United States v. Dadi*, 235 F.3d 945, 954-55 (5th Cir. 2000); *United States v. Hemmingson*, 157 F.3d 347, 360-63 (5th Cir. 1998). Our Court therefore differs from those circuits which view the initial choice of which guideline to apply as a question of law subject to de novo review. See *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999).

[49] *See* 18 U.S.C.A. § 3553(b) (2000) (requiring a court to follow the applicable guideline unless it finds that "there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission").

guidelines in this case therefore constitutes a refusal to grant a downward departure—a decision which this Court may not review.

D.

Babo Loe also challenges her money laundering conviction on count 25, arguing that the evidence was insufficient to support the verdict. We review the evidence to determine whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt.[50] Babo Loe notes that she spent some of the fraudulently obtained money years after having received it. She contends that the passage of time negates the inference that she knew that she was spending "dirty" funds. This argument is meritless. A rational jury could find that she possessed such knowledge at the time of the transaction. Babo Loe asks this Court to effectively re-weigh the evidence. We refrain from taking such a step and reject her sufficiency challenge.[51]

E.

Babo Loe argues that the forfeiture of the Florida property should be reversed on three grounds: the indictment did not allege the extent of her interest in the property; the forfeiture was not incorporated in the judgment; and the forfeiture is disproportionate to the offense. We reject each of these contentions.

First, the indictment was sufficient. Rule 7(c)(2) of the Federal Rules of Criminal Procedure states: "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information shall allege the extent of the interest or property subject to forfeiture." As this Court has noted, "the purpose of the notice of forfeiture in the

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[50] *See United States v. Mergerson*, 4 F.3d 337, 341 (5th Cir. 1993).

[51] *See United States v. Bailey*, 444 U.S. 394, 414, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980).

indictment is to inform the defendant that the government seeks forfeiture as a remedy." [52] An indictment is sufficiently specific if it "puts the defendant on notice that the government seeks forfeiture and identifies the assets with sufficient specificity to permit the defendant to marshal evidence in their defense." [53] Babo Loe asserts that the indictment was insufficient because it failed to specify the interest in the property that was subject to forfeiture, which the court later determined to be 52.6 percent. Rule 7(c)(2) does not require the level of detail sought by Babo Loe. She had ample notice that the Florida property itself was subject to forfeiture. Her defense could not have been jeopardized by the Government's failure to more precisely delineate the scope of the forfeiture.[54]

Second, the forfeiture was incorporated in the judgment. Rule 32(d)(2) of the Federal Rules of Criminal Procedure provides: "At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment." In this case, Judge Brown indicated orally at the sentencing hearing that the Florida property would be forfeited. Moreover, the court issued a written preliminary order of forfeiture on March 31, 1999. However, the judgments of conviction did not refer to the March 31st order or discuss forfeiture. Upon the Government's motion, the court entered a nunc pro tunc amendment to the written order describing the forfeited property.[55] We find nothing objectionable about this procedure. Moreover, in the event of a conflict between an oral judgment and a written order, the oral ruling

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[52] *United States v. Puma*, 937 F.2d 151, 156 (5th Cir. 1991) (quoting *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983)).

[53] *Puma*, 937 F.2d at 156.

[54] *See id.* at 156-57.

[55] *See* Fed. R. Crim. Proc. 36 (2000).

prevails.[56] The court's oral pronouncement on forfeiture, which it issued at the sentencing hearing, consequently remains effective in the face of a contrary written judgment.

Finally, the forfeiture is not excessive. The court ordered Babo Loe to forfeit only so much of the property as was purchased with illegally obtained funds—money that she had no right to in the first place.[57] We therefore find no disproportionality, let alone the "gross disproportionality" required by United States v. Bajakajian.[58]

F.

Babo Loe argues that the Government failed to adduce evidence sufficient to support venue for count 19, mail fraud. As a "continuing offense," mail fraud may be prosecuted in "any district in which such offense was begun, continued, or completed." [59] Although the government must prove venue by the preponderance of the evidence, circumstantial evidence alone is sufficient to establish venue.[60] On appeal, we view the evidence in the light most favorable to the Government, drawing all reasonable inferences in favor of the verdict.[61]

Babo Loe's contention is meritless. The evidence supports a finding that on three occasions she mailed numerous documents from locations in the Eastern District of Texas in furtherance of the fraudulent conspiracy. Babo Loe contends

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[56] *See United States v. McDowell*, 109 F.3d 214, 217 (5th Cir. 1997); *United States v. Shaw*, 920 F.2d 1225, 1231 (5th Cir. 1991).

[57] *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994).

[58] 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Cornelius Loe adopts Babo Loe's arguments regarding the forfeiture. For the reasons given above, they fail as applied to his case.

[59] 18 U.S.C.A. § 3237(a) (2000).

[60] *See United States v. White*, 611 F.2d 531, 534-35 (1980).

[61] *Id.* at 535.

that, if the three mailings described above support her conviction on mail fraud, that count 19 suffered from duplicity. "An indictment may be duplicitous if it joins in a single Count two or more distinct offenses." [62] However, count 19 only alleges a single act of mail fraud. Babo Loe also does not claim prejudice as a result of duplicity in count 19.[63]

Her argument is more appropriately considered as a claimed variance. Variance results when "the charging terms of the indictment remain unaltered, but the evidence at trial proves facts other than those alleged in the indictment." [64] The dates of the three mailings differ slightly from the date presented in the indictment. Moreover, three acts of mail fraud were proven at trial, whereas the indictment only charged one act. We are unconvinced that this variance affected Appellant's "substantial rights." [65] Babo Loe does not allege prejudice and we do not discern the potential for such prejudice on the facts of this case.

G.

Babo Loe further contends that the cumulative effect of numerous evidentiary errors committed by the district court violated her rights under the Confrontation Clause.[66] We review evidentiary rulings for an abuse of discretion.[67] Although Babo Loe provides numerous cites to the record,

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[62] *See United States v. Sharpe*, 193 F.3d 852, 870 (5th Cir. 1999).

[63] *See United States v. Drury*, 687 F.2d 63, 66 (5th Cir. 1983) (finding that, even if an indictment was duplicitous, there was no prejudice).

[64] *Sharpe, 193 F.3d at 866* (quotations omitted).

[65] *See Fed. R. Crim. Proc.* 52(a) (2000); *Sharpe*, 193 F.3d at 866; *United States v. Faulkner*, 17 F.3d 745, 760 (5th Cir. 1994); *United States v. Winship*, 724 F.2d 1116, 1122 (5th Cir. 1984).

[66] U.S. Const. amend. VI.

[67] *See United States v. Pace*, 10 F.3d 1106, 1113-14 (5th Cir. 1993).

she fails to indicate how a specific cited decision by the court was erroneous. More fundamentally, she concedes that none of these decisions constituted an abuse of discretion. She argues that the cumulative effect of these "errors" was prejudicial to her Sixth Amendment rights.

We fail to see how the whole can be greater than the sum of its parts. There can be no error if the district court acted within its discretion. As the cumulative effect of such valid discretionary decisions cannot violate the Sixth Amendment, Babo Loe's argument fails.[68]

H.

Babo Loe contends that the district court denied her right to compulsory process by quashing the subpoena duces tecum she had issued to the Corps. Under Rule 17(c) of the Federal Rules of Criminal Procedure, a district court has discretion to "quash or modify the subpoena if compliance would be unreasonable or oppressive."[69] On appeal, Babo Loe must show that (1) the subpoenaed document is relevant, (2) it is admissible, and (3) that it has been requested with adequate

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[68] Babo Loe's reliance on *United States v. Riddle*, 103 F.3d 423, 434-35 (5th Cir. 1997), is misplaced. In that case, we held that the cumulative effect of actual errors—i.e., rulings in which the district court abused its discretion—prejudiced the defendant. We recognize that evidentiary rulings must be viewed in context. A decision to exclude evidence may, in light of prior evidentiary rulings, constitute an abuse of discretion where that same decision would not be erroneous if considered in isolation. Our holding today does not deny the path-dependent nature of individual evidentiary rulings. In this case, Babo Loe fails to contend or prove that a specific decision was itself erroneous in light of prior rulings. We hold that the cumulative effect of a series of valid discretionary judgments can not deny defendant's rights under the Confrontation Clause.

[69] Fed. R. Crim. Proc. 17(c) (2000).

specificity.[70] We review the grant of a motion to quash for abuse of discretion.[71]

The district court quashed the subpoena on the basis that it lacked the requisite specificity. Babo Loe does not challenge the court's finding. Instead, she argues that the court should have modified, rather than quashed, the subpoena. This was not an abuse of discretion.[72]

IV. LOE'S HIGHPORT, INC.

A.

LHI argues that the money laundering convictions for counts 22-24 must be reversed. LHI contends, first, that the evidence can not establish that at least $10,000 of the "traced" money was fraudulently obtained "dirty money."[73] LHI also argues that the district court's jury instructions were erroneous. The court told the jury that "you may find, but are not required to find, that in a [transaction from a commingled fund], as the language of Section 1957 permits, that the transacted funds, at least up to the full amount originally derived from the crime, were the proceeds of the criminal activity or derived from that activity."

As this Court has noted, money is fungible.[74] The commingling of assets has placed courts in the difficult position of separating "clean" from "dirty" funds. Although any accounting method employed to this end inevitably exhibits certain "arbitrary" characteristics,[75] a rule of deci-

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[70] *See United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992).

[71] *See id.*

[72] We note that Babo Loe never filed a request for a modified subpoena.

[73] *See* 18 U.S.C.A. § 1957 (2000).

[74] *See United States v. Davis*, 226 F.3d 346, 357 (5th Cir. 2000).

[75] *See United States v. Moore*, 27 F.3d 969, 976-77 (4th Cir. 1994).

sion is necessary. In *United States v. Davis*,[76] we stated the following rule for section 1957 cases involving commingled accounts: "When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account."[77] Davis also implies the converse--that where an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money.[78]

In this case, counts 22-24 were based on transactions originating in a $776,742 transfer from an account containing $2,205,000 paid by Lexington to the Loes. Of the $2,205,000, only $470,790.22 was fraudulently obtained. Since there was enough clean money in the account to cover the $776,742 transfer, the rule of Davis mandates reversal of counts 22-24. No reasonable juror could conclude that these money laundering convictions were warranted beyond a reasonable doubt.[79] Moreover, the jury instructions were also

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[76] 226 F.3d 346 (5th Cir. 2000).

[77] *Davis*, 226 F.3d at 357; *see also United States v. Rutgard*, 116 F.3d 1270, 1291-92 (9th Cir. 1997) (holding that money from a commingled account is presumed to be clean). But cf. *United States v. Tencer*, 107 F.3d 1120, 1131 (5th Cir. 1997) (holding that, for a conviction under section 1956, "it is sufficient if the government proves at least part of the money represents [proceeds of mail fraud]"). We note that the Fourth and Third Circuits employ a presumption contrary to that which we applied in Davis. *See United States v. Sokolow*, 91 F.3d 396, 409 (3d Cir. 1996) (articulating presumption that money from commingled account is dirty); *Moore*, 27 F.3d at 976-77 (same). The presumption employed in Sokolow and Moore may be constitutionally infirm. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) (holding that jury instructions creating a conclusive presumption against the defendant as to an element of a crime violates the Fourteenth Amendment).

[78] *Cf. United States v. Poole*, 557 F.2d 531, 535-36 (5th Cir. 1977).

[79] *See United States v. Giraldi*, 86 F.3d 1368, 1371 (5th Cir. 1996).

plainly inconsistent with Davis. As Babo Loe adopts LHI's arguments with respect to counts 22-24,[80] her convictions under these counts must also be reversed.[81]

A proportionality rule would avoid some of the oddities associated with the Davis approach. Under Davis, if aggregate withdrawals are less than the amount of clean funds in the account, the statute is not violated. However, once withdrawals exceed the clean funds in the account, all subsequent transactions (including the transaction by which the defendant exceeds the clean-funds threshold) are transformed into "dirty" transfers warranting conviction. A proportionality rule avoids this somewhat mechanistic result.

Moreover, a proportionality rule is more sensitive to the fungible nature of money. Whereas the Davis rule engages in a presumption that clean money is spent before dirty money, a proportionality rule recognizes that a withdrawal mirrors the sources of the money in the account. If the account is the product of clean and dirty money, a withdrawal should reflect this arrangement in equal proportions.

Finally, this rule would be more faithful to the plain language of the statute. The Davis rule allows a court to look

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[80] Neither party appeals its money laundering convictions under counts 25, 29, 30, and 31. As discussed in a preceding section of this opinion, Babo Loe's sufficiency of the evidence challenge to count 25 is without merit. She did not adopt LHI's arguments for purposes of count 25. However, we note that application of the Davis rule would not change the outcome of her conviction on this count.

[81] There is much to be said in favor of a "proportionality" rule. Under such a rule, courts would treat any withdrawal from an account as containing proportional fractions of clean and dirty money. Applying the facts of the instant case, "dirty" funds ($470,790.22) comprised approximately 21 per cent of the total amount in the account ($2,205,00). Applying this same proportion to the withdrawal in question ($776,742), $165,842.42 of the funds withdrawn would be "dirty." As this amount exceeds the $10,000 threshold articulated in section 1957, LHI's conviction would be justified.

at the total number of withdrawals from an account, aggregating a series of transactions. See *United States v. Davis*, 226 F.3d 346, 357 (5th Cir. 2000); see also *United States v. Heath*, 970 F.2d 1397, 1404 (5th Cir. 1992). However, section 1957 imposes liability on a transaction-by-transaction basis. See 18 U.S.C.A. § 1957 ("Whoever . . . knowingly engages . . . in a monetary transaction in [dirty money] of a value greater than $10,000 . . . shall be punished."). A proportionality rule would avoid the aggregation mechanism condoned in Davis and more accurately reflect the language and purpose of the statute. However, as the Davis rule is binding on this panel, see *Broussard v. Southern Pac. Transp. Co.*, 665 F.2d 1387, 1389 (5th Cir. 1982) (en banc), we must apply it to the case at bar, leaving change to a case appropriately before the en banc court.

B.

LHI also argues that the indictments for money laundering were defective because they failed to list a "specified unlawful activity" that was the source of the laundered money. Section 1957 requires that the defendant (1) knowingly (2) use "criminally derived property of a value greater than $10,000" (3) in a monetary transaction, and (4) that the property must be "derived from specified unlawful activity." [82]

Each of the money laundering counts referred to one of the counts alleging conspiracy to commit mail and wire fraud. The conspiracy counts listed several alleged acts of mail and wire fraud. LHI notes that the money laundering counts of the indictment did not specify which act of mail or wire fraud was the source of the funds. Consequently, LHI argues that the indictment allowed for a non-unanimous jury verdict regarding which act of fraud was the source of the money.

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[82] 18 U.S.C.A. § 1957 (2000).

This argument misinterprets the term, "specified unlawful activity." This term does not imply that the indictment must list a specific unlawful act that is the source of the money. Instead, the statute proposes "specified unlawful activity" as a term of art.[83] A specified unlawful activity is one of a set of federal crimes listed in 18 U.S.C.A. § 1956(c)(7). Section 1957 merely requires money to be derived from a particular set of federal crimes. It does not require the indictment to specify which unlawful activity generated the funds in question. In any case, we note that the money laundering counts of the indictment included allegations sufficient to (1) enumerate each element of the offense; (2) provide Appellants with notice of the precise transactions for which they were being prosecuted; and (3) prevent future prosecutions for the same offense.[84] Thus, the indictment was sufficient.

Nor is jury unanimity regarding the specified unlawful activity required. Our holding in *United States v. Short* [85] affirms this conclusion. In Short, we upheld the conviction of a defendant as a "supervisor" of a continuing criminal enterprise.[86] We found that the jury need not unanimously agree on the identities of the five subordinates required to make the defendant a supervisor.[87] Short indicates that contextual, predicate information need not be as precisely proven as the defendant's acts. In this case, LHI was indicted for the commission of a single act, engaging in a monetary transaction. This act was clearly identified to the jury.[88]

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[83] *See* 18 U.S.C.A. § 1957(f)(3) (2000).

[84] *See United States v. Flores*, 63 F.3d 1342, 1360-61 (5th Cir. 1995).

[85] 181 F.3d 620 (5th Cir. 1999).

[86] *See* 21 U.S.C.A. § 848 (2000); *Short*, 181 F.3d at 623-24.

[87] *See Short*, 181 F.3d at 623-24.

[88] LHI's reliance on *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), is misplaced. In that case, we held that jury instructions that did not require unanimity regarding the defendant's actus reus violated his

C.

LHI further argues that the district court erred in excluding the testimony of an expert witness during the trial of counts 7-10. These counts accused LHI of having made false statements on a tax return, in violation of 26 U.S.C. § 7206(1). The defense expert would have testified that LHI overpaid, rather than underpaid, its taxes. LHI contends that the district court abused its discretion and deprived LHI of its Sixth Amendment right to call witnesses in its favor.

The district court offered three reasons for excluding the testimony. First, the court found that the evidence was irrelevant. Second, the court expressed serious doubts as to whether tax liability could be accurately calculated given the poor condition of LHI's books. Finally, the court found that the defense provided the Government with inadequate notice that Appellants intended to offer the expert's testimony.

LHI challenges each of the preceding bases for the court's decision. LHI contends that evidence of tax liability is relevant to its motive to make a false statement.[89] LHI argues that proof of motive tends to prove knowledge and intent. Therefore, if LHI had overpaid its taxes, it is less likely that it would have intended to make the false statement.

Although we recognize the intuitive appeal of this syllogism, we are unpersuaded by LHI's reasoning. This Court has specifically held that evidence of tax liability is

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Sixth Amendment rights. See *id.* at 458-59. The jurors in Gipson could have disagreed as to whether the defendant "received" or "sold" stolen property. Consequently, the verdict could not be deemed unanimous. See *id.* at 458. In contrast, the conduct of the defendant in the instant case was identified to the jury.

[89] Violation of 26 U.S.C. § 7206(1) requires the Government to prove, inter alia, that a defendant willfully made and subscribed to false tax returns and that it did not believe the returns to be true as to every material matter. *See United States v. Wilson*, 887 F.2d 69, 72 (5th Cir. 1989).

irrelevant in false statement cases.[90] Although reliance on a qualified tax preparer is an affirmative defense in such cases,[91] LHI does not contend that the expert's testimony would have established reliance.

Even if we found this testimony to be logically relevant to LHI's intent, a court could reasonably find that other factors outweighed its probative value. The court could have determined that evidence of tax liability would confuse the jury, misleading it into believing that tax liability is an element of the offense. Moreover, the court could have found that such proof would waste time on collateral issues.[92] Nothing prevented Appellants or their tax preparers from testifying that they were unaware of their tax liability or that they did not intend to make a false statement. We find that the court did not abuse its discretion in excluding the testi mony.[93] We therefore need not address the adequacy of the court's additional reasons for excluding the testimony.[94]

D.

LHI further contends that the district court erred in computing restitution for the fraudulent invoices submitted to the insurers. The district court ordered restitution of the entire value of the invoices with no reduction to reflect the actual costs that LHI incurred in mitigating losses. It is undisputed that LHI expended substantial sums in mitigating damage from the 1990 flood. On the basis of evidence submitted to

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[90] *See United States v. Johnson*, 558 F.2d 744, 745 (5th Cir. 1977).

[91] *See Wilson*, 887 F.2d at 73.

[92] *See* Fed. R. Evid. 403 (2000); *Johnson*, 558 F.2d at 747.

[93] *See United States v. Willis*, 38 F.3d 170, 174 (5th Cir. 1994) (stating that a court's decision to exclude expert testimony is reviewed for abuse of discretion).

[94] Babo Loe adopts the preceding argument, which fails for the reasons given above.

the district court, LHI contends that court abused its discretion in failing to offset LHI's expenses from the restitution amount.[95]

LHI's argument is meritless. The court found that neither the fraudulent invoices nor other evidence credibly reflected the actual expenses incurred by LHI. LHI was unable to provide reliable evidence supporting its claims. Although a defendant in LHI's position would normally be entitled to a reduction in the restitution award,[96] the absence of credible evidence to support a claim of mitigation loss would preclude such an offset. We find that the court's decision did not constitute an abuse of discretion.[97]

V. CONCLUSION

We AFFIRM the conviction of Appellants as to all counts except counts 22-24. As the evidence was insufficient to support a verdict, we REVERSE the convictions of Babo Loe and LHI on counts 22-24 and REMAND to the district court for resentencing.

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[95] *See United States v. Chaney*, 964 F.2d 437, 451-52 (5th Cir. 1992) (articulating an abuse-of-discretion standard for restitution calculations).

[96] *See* U.S.S.G. § 2F1.1, cmt. note 8 (2000).

[97] Cornelius Loe adopts the preceding argument. For the reasons articulated above, this argument fails as applied to his case.

DISSENT:

DeMOSS, *Circuit Judge*, dissenting:

With all due respect, I cannot join in the generalizations and circuitous reasoning by which the majority concludes that the conduct charged in Count 17 of the indictment was not barred by the five-year statute of limitations. Count 17 of the indictment charged a conspiracy (in violation of § 371) "to defraud insurance companies and to obtain money and property by means of false and fraudulent pretenses and promises by use of facilities of the U.S. mail (in violation of § 1341) and by use of transmissions in interstate commerce by means of wire communications (in violation of § 1343).

The elements of the offense prohibited by § 371 are (1) the making of an agreement by two or more persons to violate a criminal statute of the United States, and (2) the doing by one or more such persons of any act to effect the object of such conspiracy, i.e., the violation agreed upon. In this case, Count 17 charges a conspiracy to violate § 1341 (mail fraud) and § 1343 (wire fraud). The elements of the offense of mail fraud are (1) the devising of a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, and (2) placing any matter or thing in the U.S. mails for the purpose of executing such scheme. The elements of wire fraud are (1) devising a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, and (2) transmitting by means of wire, radio, or television communication in interstate or foreign commerce any writing, sign, signal, picture, or sound for the purpose of executing such scheme.

In the indictment in this case, Count 17 contains a separate section headed "THE SCHEME TO DEFRAUD." That portion of Count 17 states that the defendants "would submit or cause to be submitted, false and fraudulent claims to the

insurance companies covering the losses caused by the 1990 flood in order to inflate the loss to the marina and the restaurants." This portion of Count 17 goes on to indicate that the false and fraudulent claims "would be false and fraudulent in one or more of the following ways" and there follows six separate subparagraphs specifically describing various fictitious claims, duplicate invoices, invoices for losses which had not actually occurred, invoices which were altered to increase the amount of expenditure made, fictitious corporations that were formed to be third-party contractors, and false claims for business interruption loss which understated the amount of income to the marina.

There then follows another subpart of Count 17 headed "MANNER AND MEANS" which alleges the manner and means by which the scheme to defraud would be accomplished as follows:

> 1) The defendants would systematically inflate casualty and business interruption losses to the property and businesses of LOE'S HIGHPORT, INC.
>
> 2) The defendants would submit, or cause to be submitted, via the United States Postal Service or by means of interstate wire communications, false claims to the insurance companies covering such losses for payment.

I think it is critically important to note that in the subparts of Count 17 of the indictment, headed "THE CONSPIRACY", "THE SCHEME TO DEFRAUD", and the "MANNER AND MEANS", there is absolutely no mention whatsoever of any controversy between the defendants and David Hull, who leased a portion of the marina premises for operating a waterfront restaurant. Likewise, there is no mention of any kind of any controversy with David Hull regarding distribution of insurance proceeds in connection with the 1990 flood damage.

Count 17 further alleged in 22 separate subparagraphs overt acts which the defendants committed on specific days and in specific manner. The first 20 of these subparagraphs allege overt acts which expressly include references to use of facilities of the U.S. Postal Service or interstate wire communications. The first 20 of these overt acts allege conduct occurring on dates that were more than five years prior to the filing of the initial indictment in this case. The overt act in paragraph 21 is alleged to have occurred on November 26, 1990, which is more than five years prior to the filing of the original indictment in this case on September 21, 1997; and this subparagraph contains absolutely no allegation of any kind relating to the use of facilities of the U.S. Post Office or any interstate wire transmission facility. The conduct described in subparagraph 21 is the filing of a lawsuit against David Hull, individually, and in his capacity as Waterfront Restaurant. David Hull is not a named co-conspirator in the indictment nor is he named as an unindicted co-conspirator.

The last overt act alleged in Count 17 reads as follows:

> 22) On or about December, 1992, BABO BEAZLEY LOE, C.D. LOE, JR. and LOE'S HIGHPORT, INC. effected a settlement of the lawsuit and received a portion of the fraudulently obtained insurance proceeds.

While the date of December 1992 would be within five years of the filing of the initial indictment, there is absolutely nothing in this subparagraph 22 which specifies the use of any U.S. Post Office facility nor any interstate wire transmission facility. Neither § 1341 nor § 1343 makes a crime out of merely fraudulent misrepresentations or false promises; rather, each of these statutory provisions makes a crime out of (1) use of the U.S. mails (§ 1341) or (2) transmission of a matter by interstate wire communications for the purpose of "executing" some fraudulent scheme. I find very convincing the arguments advanced by defendant,

C. D. Loe, Jr., (and adopted by Babo Beazley Loe and Loe's Highport, Inc.) that no such conduct on the part of any of the defendants was alleged in subparagraphs 21 and 22 of Count 17, and there is no testimony in this record that any such conduct did occur. The language in paragraph 22 of Count 17 that the defendants "effected a settlement of the lawsuit" refers to the lawsuit described in paragraph 21, which was filed on November 26, 1990. In this lawsuit, the Loes sought recovery of money loaned to David Hull. There is no factual allegation and no factual proof that the settlement of that lawsuit was the result of anything sent by the U.S. mail nor any matter transmitted by wire communication. There is no factual allegation nor any factual proof that the settlement of such lawsuit was the result of any conduct that was false, fraudulent, or misleading. There is no factual allegation and no factual proof that the insurance company that was the victim of the scheme to defraud alleged in subparagraphs one through 20 of Count 17 even knew of such settlement, much less that it was motivated to take any action based thereon. To the contrary, the record evidence in this case is clear and unequivocal that the insurance company had paid all sums of money which it intended to pay on the "fraudulent" claims submitted by the Loes for the 1990 flood damage by July 11, 1991, some 14 months prior to September 12, 1992, the date upon which the five-year statute of limitations cut off would be applicable. In my view, when the insurance company deposits into the registry of the court a sum of money which it considers to be full and final payment for all of the costs and losses sustained in the 1990 flood damage at the Loes' marina, the fraud and misrepresentations would be complete regardless of whether the Loes ever withdrew the money from the registry of the court or not. Surely, actual receipt by a defendant of the cash proceeds of his fraudulent conduct cannot be an essential element of the offense; and "constructive receipt" by the defendants of the cash proceeds by the placing of the funds in the registry of the court as

occurred in this case should start the running of the statute of limitations. All of the funds paid by the insurance company on the basis of fraudulent loss claims were deposited into the registry of the state court (a total of close to $2 million), and all but $2,000 of that sum was withdrawn by the defendants more than five years prior to the filing of the first indictment in this case. While it is true that the $2,000 was disbursed from the registry of the court within five years prior to the filing of the first indictment, I think even the majority would agree with me that the facts clearly indicate that the defendants had absolutely nothing to do with the delay in disbursement. That delay was the result of (1) errors and omissions on the part of the state district court in framing the disbursal order, (2) unauthorized decisions by the investment company holding the funds to give greater weight to the state judge's language as to the amount to be retained rather than the amount to be paid to the defendants, and (3) a failure on the part of counsel for the defendants to promptly call for a correction of this mathematical error.

With surprising candor, the government recognizes that the only way it can avoid application of the five-year statute of limitations to Count 17 is to persuade the Court that the conduct described in overt act 22 (i) constitutes an act by one or more of the defendants and (ii) constitutes an act "to effect the object of the conspiracy" alleged in Count 17. In my view, the conduct in overt act 22 was neither.

The case law precedents which should guide our determination are for the most part well established. In *Grunewald v. United States*, 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), the Supreme Court clearly held that in order for the government to sustain a conviction for conspiracy against a statute of limitations defense, the government must prove that the conspiracy was still in existence as of the limitations bar date and that at least one overt act by a defendant was performed after that date.

Likewise, the Supreme Court has clearly stated that when doubt exists about the statute of limitations in a criminal case, the limitations period should be construed in favor of the defendant. See *United States v. Habig*, 390 U.S. 222, 226-27, 19 L. Ed. 2d 1055, 88 S. Ct. 926 (1968). This rule of construction in favor of the defendant has been recently recognized by our Circuit in *United States v. Meador*, 138 F.3d 986 (5th Cir. 1998). The question of whether a prosecution is barred by the statutes of limitations is a question of law, subject to plenary review on appeal in this Circuit. *United States v. Manges,* 110 F.3d 1162, 1169 (5th Cir. 1997). In *Manges*, our Court stated:

> Shanklin claims that he was prosecuted in violation of the applicable five-year statute of limitations. See 18 U.S.C. § 3282. With respect to the conspiracy count only, we agree. Our review is plenary.

Id. at 1169 (emphasis added). The Supreme Court has also clearly held that "statutes of limitations normally begin to run when the crime is complete." *Pendergast v. United States*, 317 U.S. 412, 418, 87 L. Ed. 368, 63 S. Ct. 268 (1943). And the text of the five-year statute (18 U.S.C. § 3282) expressly states that the five-year limit applies "except as otherwise expressly provided by law." In light of these principles, the Supreme Court has held that "the doctrine of continuing offenses should be applied in only limited circumstances" and should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion." *Toussie v. United States*, 397 U.S. 112, 114, 25 L. Ed. 2d 156, 90 S. Ct. 858 (1970). Finally, in *United States v. Marion*, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971), the Supreme Court stated that statutes of limitations,

> represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may (during the

> limitation) . . . have lost their means of defense." These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.

Id. (citation omitted).

In addition to the foregoing Supreme Court authority, we have clear holdings by panels of this Circuit to guide us in this case. In the early case of *United States v. Davis,* 533 F.2d 921 (5th Cir. 1976), our Court wrestled with a controversy very similar to the one in this case. In Davis, the indictment charged conspiracy to violate 18 U.S.C. § 1006 by agreeing to make false, fictitious, and fraudulent statements and representations to the Department of Labor Manpower Administration, an agency of the United States Government. Only two of the eight overt acts set forth in the indictment were alleged as occurring within the five-year period of the statute of limitations. The defendant in Davis asserted that the two overt acts which happened within the five-year limitations period did not constitute acts in furtherance of the conspiracy alleged and our Court agreed. Relying on most of the Supreme Court law referred to earlier, our Court concluded that the prosecution of Davis was barred by the statute of limitations and granted a judgment of acquittal.

Similarly, in *United States v. Manges, supra,* a panel of our Court addressed specifically the circumstances of a charge of conspiracy to violate the mail fraud statute against a defendant's contention that it was barred by the five-year statute of limitations. In reversing the conviction of the defendant on this conspiracy count, our Court pointed out that the conspiracy statute (18 U.S.C. § 371) "explicitly provides that for the crime of conspiracy to be complete, one or more of the conspirators must have performed an act to bring about the object of the conspiracy. This language cannot be stretched to include the posting of a letter by a non-conspirator."

In my view, our Circuit holdings in Davis and Manges, provide much clearer and better instruction as to the disposition of this case now before us than does our holding in *United States v. Girard*, 744 F.2d 1170 (5th Cir. 1984), which is the centerpiece and corner-stone of the government's theory in this case. In Girard, the grand jury indicted the defendants for conspiring to defraud the United States in violation of 18 U.S.C. § 371. The indictment alleged that the scope of the conspiracy encompassed three purposes: (1) to secure the contract for Girard Plumbing; (2) to obtain Housing Authority funds under the contract; and (3) to conceal the fraudulent nature of the bidding from the appropriate authorities. The government asserted that the last payment due under the contract occurred on a date inside the five-year statute of limitations. In light of this payment, our Court concluded that the conspiracy continued until this last payment was received and that the acceptance of the last payment under the contract satisfied the requirement that an overt act in furtherance of the conspiracy occurred within the proscribed time frame.

I note that the majority does not say that they are bound by the prior decision in Girard, but merely categorize that decision as "instructive." I have no quarrel with our Court's holding in Girard based on the express circumstances described therein, but I disagree wholeheartedly with the majority's conclusion that it provides even "instructive" help in deciding the issue here in Loe. The distinctions between Girard and Loe are fundamental and significant. In Girard, the charge was conspiracy to defraud the United States directly under § 371; in Loe, the charge was conspiracy to commit mail fraud and wire fraud against a private insurance company. In Girard, there were express allegations of three purposes for the conspiracy which included receipt of the funds to be paid by the United States Government under the contract with Girard which was fraudulently secured; and such allegations tied in neatly with the fact of final payment

by the United States Government to Girard on the contract within the five-year statute of limitations. I challenge my colleagues in the majority to find similar express allegations in the language of Count 17 of the indictment of this case. As I have described previously, in Count 17 there is nothing in the subparts thereof describing The Conspiracy, The Scheme to Defraud, and The Manner and Means which can be connected with or anticipates in any way the allegations in subpart 22 of the overt acts. Finally, in Girard, it is clear that the final payment on the contract came from the United States Government agency that was the victim of the fraudulent bidding scheme. In contrast, here, it is clear even from the majority's opinion that the insurance company that was the target and victim of the alleged mail and wire frauds deposited a final payment into the registry of the court in the sum of $638,388.34 in July of 1991, some 14 months outside of the five-year limitations period, which started on September 11, 1992. And in March 1992, some six months outside of the limitations period, the state district court ordered that $624,867.79 be paid to the Loes, which was their true and rightful share of the insurance proceeds deposited into the registry of the court. The $2,000 which was ultimately distributed to Babo Loe as Trustee for Loe's Highport in January or February 1993, was a part of the sum previously ordered to be distributed in March 1992 by the district court. There is, therefore, no allegation in Count 17 and no proof thereof cited by the government that would indicate any payment by the insurance company that was the victim of the alleged frauds to the defendants during the five-year period of limitations.

For all of the foregoing reasons, I respectfully dissent from the portion of the majority opinion that affirms the convictions and sentences of the defendants relating to Count 17. In my view, Count 17 was clearly barred by the statute of limitations, and the convictions and sentences of defendants based on Count 17 should be vacated and set

aside. For two of the defendants, Babo Loe and Loe's Highport, Inc., vacation of these convictions and sentences would not produce any significant reduction in the sentences that they received under other convictions from this indictment. However, as to defendant, C. D. Loe, Jr., whose only conviction was under Count 17, vacation of the conviction and sentence on Count 17 would relieve him of being a convicted felon and the burden of having to respond in fines and restitution obligations after his release from prison.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40454, Consolidated with Case No. 99-40495,
Consolidated with Case No. 99-41470,
Consolidated with Case No. 00-40690

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CORNELIUS DEWITTE LOE, JR., also known as C.D. LOE; BABO BEAZLEY LOE; LOE'S HIGHPORT, INC.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOE'S HIGHPORT, INC.; BABO BEAZLEY LOE,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BABO BEAZLEY LOE; LOE'S HIGHPORT, INC.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BABO BEAZLEY LOE; LOE'S HIGHPORT, INC.,
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas.

June 21, 20001, Decided

JUDGES: Before HIGGINBOTHAM and DeMOSS, *Circuit Judges*, and FISH,* *District Judge.*

OPINION: ON PETITIONS FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

In a footnote, the panel opinion states that "neither party appeals its money laundering convictions under counts 25, 29, 30, and 31." *United States v. Loe*, 248 F.3d 449, 467 n.80 (5th Cir. 2001). The opinion should have indicated that neither party challenges its conviction under these counts on the grounds discussed in that section of the opinion, that the evidence was insufficient to establish that at least $10,000 of the "traced" funds was fraudulently obtained. As the opinion recognizes in the same footnote, Babo Loe raised a more general sufficiency challenge to Count 25, which the opinion rejected. Both Loe's Highport, Inc. and Babo Loe also appealed their convictions on counts 25, 29, 30, and 31 on a distinct rationale, arguing that the indictment allowed for a non-unanimous jury verdict. This Court was unpersuaded by

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* District Judge of the Northern District of Texas, sitting by designation.

Appellants' contention and affirmed the convictions on these counts.

With the clarification of this order, the Petitions for Panel Rehearing are DENIED. No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. and 5th Cir. R. 35), the Petitions for Rehearing En Banc filed by Appellants Loe's Highport, Inc. and Cornelius Dewitte Loe, Jr. and Appellee are also DENIED.

APPENDIX C

COUNTS 22-31

VIOLATION: 18 U.S.C. § 1957 & 2 (Engaging in Monetary Transaction in Property Derived From Specified Unlawful Activity & Aiding and Abetting)

PENALTY: A fine of not more than $250,000 (or an alternate fine of not more than twice the amount of the criminally derived property involved in the transaction) or imprisonment for not more than 10 years, or both. A term of supervised release of not more than 3 years.

MANDATORY ASSESSMENT; $50 per count

On or about each of the dates set forth below, in the Eastern District of Texas, the Defendants, BABO BEAZLEY LOE and LOE'S HIGHPORT, INC., did knowingly engage and attempt to engage in the below-listed monetary transactions by, through or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, that is the deposit, withdrawal, transfer, or exchange of funds or monetary instruments in the amounts described below, such property having been derived from a specified unlawful activity, that is, mail fraud and wire fraud, 18 U.S.C. §§ 1341 and 1343.

COUNT	FUNDS OR MONETARY INSTRUMENT	FINANCIAL TRANSACTION DATE & AMOUNT	RECIPIENT	ORIGINAL SOURCE OF PROCEEDS	SPECIFIED UNLAWFUL ACTIVITY
22	Miller, Johnson & Kuehn; Loe's Highport Account #85230515; Wire Transfer	11/06/92 $208,100.56	Bank United for further credit to First Southwest Co., Loe's Highport Account #8000207087	Lexington Insurance Company draft #850576 paid on flood loss described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343
23	Miller, Johnson& Kuehn; Loe's Highport Account #85230515; Transfer	11/12/92 $95,000.00	Greenwood Trust Book Entry (@5.95%; maturity date 11/12/97)	Lexington Insurance Company draft #850576 paid on flood loss described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343
24	Miller, Johnson& Kuehn; Loe's Highport Account #85230515; Transfer	11/12/92 $95,000.00	First Gibraltar Bank Book Entry (@ 6.00%; maturity date 11/12/97)	Lexington Insurance Company draft #850576 paid on flood loss described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343
25	The Citizens and Southern National of Florida; Campbell, Dettman & McKinley, Inc.; Trust Account Check #0198	12/16/93 $965,000.00	Raymond A. Posegay Trust Account	Chubb Insurance Company draft #2468159 paid on business interruption and flood losses described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343

30	Bank United; wire transfer of proceeds from United Savings Association of Texas certificates of deposit #3720268592 and #3720268584	06/27/95 $196,000.00	Van Kampen American Capital for further credit to Babo Loe; Account #59-8000-597399(Prime Income Rate Trust)	Lexington Insurance Company Draft #861502 paid on restaurant contents flood loss described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343
31	Bank United; wire transfer of proceeds from United Savings Association of Texas certificate of deposit #3720268576	06/27/95 $98,000.00	Van Kampen American Capital for further credit to Babo Loe or C.D. Loe, Jr.; Account # 59-8000-597401(Prime Rate Income Trust)	Lexington Insurance Company Draft #861502 paid on restaurant contents flood loss described in Count 17	18 U.S.C. 1341 18 U.S.C. 1343

All in violation of Title 18, United States Codes, Sections 1957 and 2.